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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 326

JOHN F. CORCORAN,

Appellant,

vs.

CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

BARNET HODES,
Corporation Counsel of Chicago,
Counsel for Appellee.

ALEXANDER J. RESA,
J. HERZL SEGAL,
L. LOUIS KARTON,
SYDNEY R. DREBIN,
Assistant Corporation Counsel,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 326

Supreme Court of Illinois No. 25064.

JOHN F. CORCORAN,
Appellant and Plaintiff in Error,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee and Defendant in Error.

STATEMENT BY APPELLEE OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

The appellee, CITY OF CHICAGO, a municipal corporation, respectfully presents to the court the following matters and grounds making against the jurisdiction of the Supreme Court of the United States as asserted by the appellant herein in its statement of the basis of the Appellate jurisdiction filed herein on the 22nd day of July, 1940, as required by Rule 12 of the Supreme Court:

I.

The Ordinance of 1787 has no force of law in the State of Illinois, but has been superseded by the Constitution of the State of Illinois. The Supreme Court of Illinois has held that the statute complained of is not unconstitutional.

It appears that the basis of appellant's statement asserting jurisdiction in this Court rests on the proposition that the Ordinance of 1787 has the force of law in the State of Illinois and that the statute complained of is repugnant to the provisions of Article II thereof that "the inhabitants of the said territory shall always be entitled to the benefits of * * * the trial by jury * * *." Appellant further asserts that the Ordinance provisions contained in Section 14 render it a compact unalterable forever except by common consent of the original States and the people and States in the territory.

Pertinent to these assertions, and indicating the error thereof are decisions of this Court and of the Supreme Court of Illinois. In *Permoli* v. *First Municipality*, 3 How. (44 U. S.) 589, 11 L. Ed. 739, this court was called upon to consider the Ordinance of 1787 and its effect on the State of Louisiana. It was there urged by plaintiff in error that the Ordinance, by its terms being an unalterable compact, was still the law of the State of Louisiana. At page 610, this Court, speaking through Mr. Justice Catron, said:

> "* * * But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless

they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognisance, and equally so in the old states and the new ones; and that the writ of error must be dismissed."

Although the *Permoli* case involved the guarantee of freedom of religious worship contained in Article I of the Ordinance, it is equally applicable to Article II thereof.

That the conditions of the Ordinance of 1787 have no control over the authority and powers of a State after her admission into the Union has been affirmed in *Escanaba & Lake Michigan Transp. Co.* v. *Chicago,* 107 U. S. 678, 27 L. Ed. 442; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 29 L. Ed. 845. The Supreme Court of Illinois has reached the same conclusion, having held that when the constitution of the State of Illinois was presented to Congress, and Congress admitted Illinois to the Union, any provision in the ordinance different or in opposition to any contained in the constitution must be considered to have been by mutual consent abrogated. *Phoebe* v. *Jay,* Breese (1 Ill.) 268, 272; *Sarah* v. *Borders,* 4 Scam. (5 Ill.) 341, 348; *People ex rel. Woodyatt* v. *Thompson,* 155 Ill. 451, 471-474.

It is apparent from the authorities cited that the Ordinance of 1787 is not in force in the State of Illinois except to the extent that certain provisions in the ordinance were incorporated in the constitution of the State of Illinois.

From the opinion of the Supreme Court of Illinois in this case, it appears clearly that the statute complained of by appellant has been carefully considered and the conclusion reached by an unanimous court is that the statute does not violate the guarantee of trial by jury contained in the constitution of the State.

II.

The guarantee of trial by jury contained in the Seventh Amendment is not violated by Section 92 (3)b of the Civil Practice Act (Chap. 110, Par. 216, Ill. Rev. Stat. 1939, State Bar Assn. Ed.).

Appellant admits, and there can be no question, that the Seventh Amendment is a limitation on the powers of courts of the United States, and is not a limitation on the respective States. *Livingston* v. *Moors*, 7 Pet. (32 U. S.) 469, 8 L. Ed. 751; *Edwards* v. *Elliott*, 21 Wall. (88 U. S.) 532, 22 L. Ed. 487; *Walker* v. *Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Pearson* v. *Yewdall*, 95 U. S. 294, 24 L. Ed. 436. It must be evident therefore that the argument made by appellant in its jurisdictional statement cannot rest on any violation of the Seventh Amendment. An analysis of appellant's argument shows tha' the Seventh Amendment is involved only inferentially resulting from appellant's contention that the Ordinance of 1787 is still the law of the State of Illinois. This point we have discussed at length under our Point I and we have demonstrated that the Ordinance of 1787 has been superseded by the constitution of the State of Illinois. The gist of appellant's argument actually is that the trial by jury in Illinois under the Illinois Civil Practice act is a trial by jury different from that guaranteed by the Seventh Amendment. This question was argued at length by appellant before the Supreme Court of Illinois and the court there held, as shown by its opinion in this case, that Section

92 (3)b of the Illinois Civil Practice act is not a violation of the Illinois constitution. In its carefully considered opinion in this case the Supreme Court of Illinois concluded that "there was a practice at common law which authorized courts exercising appellate jurisdiction to set aside verdicts on the ground that the findings of fact were not supported by the evidence." This conclusion is in harmony with prior decisions of this Court in *Parsons* v. *Bedford*, 3 Pet. 433, at p. 447, where this Court refers to the method known to the common law of re-examining facts by the court "to which the record was properly returnable." The same practice is referred to by this Court in *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, at p. 246. As pointed out in its opinion, the Illinois Supreme Court held that the Illinois statute makes no change in the practice which existed at common law. This practice is the same practice which the Illinois Civil Practice act section attacked by the appellant permits in Illinois.

The argument made by appellant has been rejected by the Supreme Court of Illinois and the action of the Supreme Court, as we have pointed out, is in harmony with the decisions of this Court.

In conclusion it should be noted that although the appellant contends that he has been deprived of his right to a trial by jury, yet the order of the Appellate Court of Illinois reversing the judgment on the ground that the verdict of the jury was contrary to the manifest weight of the evidence, does not deprive the appellant of a trial by jury inasmuch as the court ordered the cause remanded for a new trial. Appellant could have availed himself of a trial by a new jury and therefore cannot be heard to urge that he has been deprived of his right to a trial by jury as at common law. It is respectfully submitted that the questions raised by appellant having been decided by this Court in

prior cases in harmony with the decision of the Supreme Court of Illinois in this case, no further argument is necessary. A motion to dismiss or affirm is therefore presented herewith.

Respectfully submitted,

BARNET HODES,
Corporation Counsel,
Of the City of Chicago,
Attorney for Appellee City of Chicago, a Municipal Corporation.

ALEXANDER J. RESA,
J. HERZL SEGAL,
L. LOUIS KARTON,
SYDNEY R. DREBIN,
Assistant Corporation Counsel,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 326

Supreme Court of Illinois No. 25064.

JOHN F. CORCORAN,
Appellant and Plaintiff in Error,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee and Defendant in Error.

MOTION OF APPELLEE TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Comes now the City of Chicago, a municipal corporation, appellee herein, by Barnet Hodes, Corporation Counsel, its attorney, and moves the Court to dismiss with costs the appeal taken herein to this Court by John F. Corcoran, appellant herein, upon the following grounds:

1. The decision of the Supreme Court of Illinois was based primarily on local law and questions of local law which are not open to re-examination in this Court.

2. The Federal question which appellant attempts to raise in this Court is foreclosed by the prior decisions of this Court.

In the alternative, appellee moves this Court to affirm the judgment of the Supreme Court of Illinois on the following grounds:

1. The decision of the Supreme Court of Illinois is not violative of the Seventh Amendment but is in harmony with prior decisions of this Court.

2. No substantial Federal question affording a basis for a review by this Court is presented by the appellant.

Respectfully submitted,

BARNET HODES,
Corporation Counsel of the City of Chicago,
Attorney for appellee City of Chicago, a municipal corporation.

ALEXANDER J. RESA,
J. HERZL SEGAL,
L. LOUIS KARTON,
SYDNEY R. DREBIN,
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